

1-1-1973

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Recommended Citation

Robert Allen Sedler, Truly Disinterested Forum in the Conflict of Laws: Ratliff v. Cooper Laboratories, The , 25 S. C. L. Rev. 185, 198 (1973)
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THE TRULY DISINTERESTED FORUM IN THE
CONFLICT OF LAWS: *RATLIFF v. COOPER*
LABORATORIES

BY ROBERT ALLEN SEDLER*

If, as Justice Holmes observed many years ago, law is no more than "prophecies of what the courts will do in fact,"¹ it should have been clear from the outset that the "law" of *Ratliff v. Cooper Laboratories*,² and the companion case of *Nichols v. Sterling Drug Co.*,³ would be that suit could not be maintained in South Carolina. The case came up on an interlocutory appeal from the district court's denial of the defendants' motion to dismiss for lack of jurisdiction, and the Fourth Circuit held that South Carolina lacked sufficient "minimum contacts" with the defendants in this case to exercise in personam jurisdiction over them. As Professors Leflar and Felix point out, the decision on the question of jurisdiction was "clearly correct,"⁴ and I have no desire to explore that point further. But I would submit that from the standpoint of "judicial behavior"⁵ the result in these cases—dismissal of the suit—probably would have been the same even if the defendants had the requisite "minimum contacts" with South Carolina.

Neither case had anything whatsoever to do with South Carolina, and in every sense South Carolina was a truly disinterested forum. The plaintiffs were non-residents. The defendants were not incorporated in South Carolina and did not have their principal place of business there.⁶ Everything connected with the acci-

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1. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

2. 444 F.2d 745 (4th Cir. 1971).

3. The cases were consolidated for purposes of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1971).

4. Leflar, *Barely Fair, Not Grossly Unfair*, *supra* p. 177; Felix, *Jurisdiction and Choice of Law*, *infra* p. 199.

5. By "judicial behavior" I mean the way that the courts deal with cases in terms of result.

6. A corporate defendant should always be amenable to suit in the state where it is incorporated or has its principal place of business. See notes 23-27, *infra*, and accompanying text. By the same token, an individual defendant should always be subject to suit at his domicile. See *Milliken v. Meyer*, 311 U.S. 457 (1940).

dents in both cases occurred outside of South Carolina. As the Court stated: "Plaintiffs' only interest in South Carolina is in its relatively long statute of limitations (six years) and plaintiffs' only contact with South Carolina is the bringing of these lawsuits for the sole purpose of availing themselves of that statute—the limitation periods having run in all other states having any connection with the claims presented—Florida, Indiana, New York, Connecticut, and Delaware."⁷ And South Carolina just as obviously had no interest in providing a forum for the plaintiffs to assert their claims that were time-barred under the law of every possibly interested state.

A highly unlikely combination of factors made it possible for the plaintiffs to plausibly bring their suits in South Carolina,⁸ and more specifically in a federal court sitting there. The only reason any plaintiff can sue in a disinterested forum is that American law recognizes what Professor Ehrenzweig has called "transient jurisdiction,"⁹ under which an individual defendant can be sued in any state where he can be served with process and a corporate defendant in any state where it is "doing business" or otherwise has sufficient "minimal contacts" so that the exercise of jurisdiction over it does not offend due process. Since the corporate defendants in *Ratliff-Nichols* "did something" in South Carolina, and since South Carolina's service of process laws have been held to extend to the "outer constitutional limits,"¹⁰ there was at least the possibility the court would find the defendants were subject to suit in South Carolina. Transient jurisdiction then is the initial factor enabling suit to be brought in a truly disinterested forum, so long as corporate defendants are "doing something" there.

The second factor that made South Carolina a possible forum was that it had a relatively long statute of limitations which had not yet expired and it did not have a borrowing statute.¹¹ In American law the question of the applicability of the

7. 444 F.2d at 746.

8. In any interstate case the choice of forum is likely to be "coolly calculated." See Sedler, *Babcock v. Jackson in Kentucky; Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27, 47 (1967).

9. See generally Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

10. 444 F.2d at 747.

11. See generally Ester, *Borrowing Statutes of Limitations and Conflict of Laws*, 15 U. FLA. L. REV. 33 (1962); Vernon, *Statutes of Limitations in the Conflict of Laws: Borrowing Statutes*, 32 ROCKY MT. L. REV. 287 (1960). Professor Ester listed 28 states, the Canal

statute of limitations has traditionally been treated as one of "procedure," and "governed" by the law of the forum. In the absence of a borrowing statute, this means that if the forum's statute has not yet expired, suit can be maintained, although it is barred by the statute of limitations of the state whose law will be applied to determine the substantive rights of the parties.

The third factor that made the suit a possibility was that although there was a South Carolina statute prohibiting non-resident plaintiffs from suing foreign corporations in South Carolina on "causes of action not arising in the state,"¹² the Fourth Circuit had held the statute was not to be applied by the federal courts in diversity cases because it was "inconsistent with federal policy."¹³ Thus, the plaintiffs thought they might be able to maintain the suit in the federal court in South Carolina since: (1) South Carolina's service of process laws had been extended to the "outer constitutional limits" (and the federal court was bound to apply this part of South Carolina law in a diversity case);¹⁴ (2) South Carolina's statute of limitations had not yet expired—it would characterize the statute of limitations issue as "procedural" and apply its own law, and it did not have a borrowing statute (here too the federal court was bound to apply South Carolina law in a diversity case);¹⁵ and (3) South Carolina's statute barring suits by non-resident plaintiffs against foreign corporations on claims arising elsewhere would *not* be applied by the federal court in a diversity action.

This unlikely combination of factors made it possible to hope the suit would be allowed by a federal court, and indeed the

Zone, Guam, Puerto Rico and the Virgin Islands as having borrowing statutes of general limitations. Ester, *supra* at 79, App. A, n. 2. My own research shows that of the states listed as not having borrowing statutes, only Michigan has enacted one since. If my research is not inaccurate, there are no borrowing statutes of general application in the District of Columbia, Arkansas, Connecticut, Georgia, Maryland, New Hampshire, New Jersey, New Mexico, North Dakota, South Dakota and Vermont, in addition to South Carolina. Also, in 1965, after publication of the Ester article, Ohio repealed its borrowing statute. See OHIO REV. STAT. § 2305.20 (1972 Supp.).

12. S.C. CODE ANN. § 10-214 (1962).

13. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965).

14. 444 F.2d at 747. It has thus far been assumed that whether a foreign corporation is subject to suit in a diversity case is to be determined by state laws. See, e.g., *Edwards v. St. Louis, S.F. R.R.*, 361 F.2d 946 (7th Cir. 1966); *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Arrowsmith v. United Press International*, 320 F.2d 219 (2d Cir. 1963).

15. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

District Judge did allow it. But, to say the least, the plaintiffs did not present a sympathetic case for the exercise of jurisdiction and it was obvious that they were taking advantage of this improbable combination of factors to bring a suit in a truly disinterested forum, a suit which could not be maintained in any of the states having a possible interest in hearing the case and in granting relief. In behavioral terms the result should have been fairly predictable. The Fourth Circuit was not about to let the plaintiffs "put one over" on the defendants and the court. It seized upon the "absence of contacts" to hold that jurisdiction could not constitutionally be exercised by a court sitting in South Carolina, and in so holding found it did not matter that Sterling was "doing more" in South Carolina than was Cooper and had actually appointed an agent to receive process.¹⁶

Let us suppose, however, the plaintiffs had been South Carolina residents who had purchased the drugs while vacationing in Florida or Indiana. Here, South Carolina would not be a truly disinterested forum. As the plaintiffs' home state, it would have an interest in providing a forum for its residents, since the social and economic consequences of the harm would have been felt there.¹⁷ While it would apply the substantive law of the state of injury, since it is committed to the "place of the wrong rule,"¹⁸ and while there is a serious question concerning whether it could constitutionally apply its own law even if it were committed to a policy-centered approach,¹⁹ its interest in providing a forum for its residents would present a more favorable case for the exercise

16. 444 F.2d at 748. See the discussion of this point in Felix, *supra* note 4, at 200.

17. See *Crider v. Zurich Insurance Co.*, 380 U.S. 39 (1965).

18. See, e.g., *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964).

19. In the absence of some contacts with the forum other than the fact of the plaintiff's residence, courts have been unwilling to apply their own law to allow recovery. See, e.g., *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). Compare *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). See also R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 247-249 (1971). My own view is that the plaintiff's home state may apply its own law despite the absence of factual contacts so long as it has an interest in doing so and the application of its law is not unfair to the other party. I contend that the "interest and fairness" test justifies application of the forum's law in the ordinary accident case whenever the nominal defendant's insurer does business in the forum. See the discussion in Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 Duq. L. REV. 394, 402-407 (1971); *Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, 61 Ky. L. REV. (1973). Whether I would go so far as to hold that (South Carolina plaintiff in the *Ratliff-Nichols* situation) is a matter I will defer until a later time.

of jurisdiction. It is not inconceivable, at least in behavioral terms, that given those circumstances, the Court would have found the activities of the defendants in South Carolina were sufficient to justify suit in South Carolina by a resident plaintiff on a claim arising elsewhere.²⁰

By the same token—and this is what concerns me more—South Carolina would have been no less a truly disinterested forum if the defendants' activities in South Carolina had been more extensive and had clearly satisfied the "minimum contacts" test. The fact that South Carolina was a truly disinterested forum in this case and the obvious taking advantage of the improbable combination of factors by the plaintiffs certainly would have influenced the Court to come up with other reasons why the suit should not be permitted.²¹ It is these other reasons I now want to explore, and I will do so in the context of assuming the same facts as in *Ratliff-Nichols* except that the activities of both defendants in South Carolina were sufficient to satisfy the "minimum contacts" test. The fact that suit could plausibly be brought in a truly disinterested forum when it was barred by limitation in all of the possibly interested states suggests to me that it is necessary to question some of our assumptions about the exercise of jurisdiction and about the application of statutes of limitations.

Ever since *Pennoyer v. Neff*,²² it has been assumed jurisdiction could be exercised on the basis of "power" over the person of the defendant, and the "power orientation" has pervaded our approach to all questions of jurisdiction.²³ Once the "power" has

20. In *Ratliff-Nichols* the court formulated the issue as, "Are the activities of the defendant drug companies extensive enough in South Carolina to warrant in personam jurisdiction when the plaintiffs are non-residents and the causes of action arose outside the forum and were unconnected with the defendants' activities in South Carolina." 444 F.2d at 747. It also noted "the lack of a 'rational nexus' between the forum state and the relevant facts surrounding the claims presented." *Id.* at 748. This suggests that a different result might have obtained if the plaintiffs had been South Carolina residents, at least as to Sterling, which had more "contacts" with the forum than Cooper.

21. The court explicitly left open the question of whether the South Carolina "door closing" statute might be a bar despite its decision to the contrary in *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965).

22. 95 U.S. 714 (1878).

23. It has always seemed quite incongruous to me that it was assumed that a non-resident could be sued in the forum on a claim having no connection with the forum, but that in the absence of personal service, there was a constitutional question whether a non-resident could be sued in the forum under a "long-arm" statute. Indeed the question of

been found to exist, little attention has been paid to the appropriateness of the exercise of jurisdiction by the particular forum, and it has been assumed, except as limited by notions of *forum non conveniens*, suit could be brought in a forum having no interest in hearing the case let alone in applying its own law. Certainly, there should always be a state where a particular defendant can be sued on any transaction; an individual defendant being subject to suit in the state of his domicile,²⁴ and a corporate defendant in the state of incorporation or the state where it has its principal place of business. Otherwise, however, the forum should exercise jurisdiction only when it has an interest in providing a forum.

I believe a state *does* have an interest in providing a forum for its resident plaintiffs to assert claims arising elsewhere, and it is perfectly proper for the plaintiff's home state to provide him with a forum in a suit against a corporate defendant having "minimum contacts" with that state even in circumstances where it would not and indeed constitutionally could not apply its own law.²⁵ But where there is no interest in providing a forum because of the plaintiff's residence, and the state is not one where an individual defendant resides or a corporate defendant is incorporated or has its principal place of business, it should not exercise jurisdiction unless it has some connection with the transaction so there is at least a possible basis for its applying its own law.²⁶

whether a non-resident could be sued in the forum on the basis of the "doing of an act" cannot be considered to have been definitively settled until *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). And even today there are some questions as to amenability of suit where harm resulting to a forum resident in the forum can be traced only to acts of the defendant occurring outside of the forum. See R. WEINTRAUB, *supra* note 19, at 113-121.

24. A particular defendant might be sued in the state of his place of principal residence if different from his technical domicile, which is not very likely today in view of the present approach to domicile. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 18 (1971).

25. As to the interest in providing a forum for resident plaintiffs, see *Crider v. Zurich Insurance Co.*, 380 U.S. 39 (1965). New York, for example, has held that suit may be brought against a non-resident defendant in an accident case by attaching the insurance policy obligation of his New York-based insurer to defend. *Seider v. Roth*, 17 N.Y.2d 111, 126 N.E.2d 312, 269 N.Y.S.2d 99 (1966). It has also been held that such attachment is not available to non-resident plaintiffs. See *Farrell v. Piedmont Aviation, Inc.*, 411 F.2d 812 (2d Cir. 1969); *Vaage v. Lewis*, 29 App. Div. 2d 315, 288 N.Y.S.2d 521 (2d Dept. 1968).

26. For a discussion of the relationship between jurisdiction and choice of law, see R. WEINTRAUB, *supra* note 19, at 67-69. As he has observed, "The proper breadth of a court's jurisdiction, in turn, should be decided with reference to what law that court will apply if it adjudicates the case in issue." *Id.* at 67.

Where, as here, the plaintiff is a non-resident and the forum has no connection with the transaction, it should not permit suit against a non-resident defendant who is physically served there or against a foreign corporation that may have "minimum contacts" with the forum, but which has its principal place of business elsewhere. In such a case it is a totally disinterested forum and should not hear the case.

South Carolina *does* bar suits against foreign corporations in these circumstances. In *Ratliff-Nichols* the Court referred to the South Carolina statute governing actions against foreign corporations as one of "door closing," but the description is not fully accurate, since the thrust of the statute, enacted in 1870 when the permissible limits of jurisdiction over foreign corporations had not yet been defined, was to allow such suits. The statute provides as follows:

An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court:

- (1) By any resident of this State for any cause of action; or
- (2) By a plaintiff not a resident of this State when the cause of action shall be situated within this State.^{26.1}

Allowing for the use of terminology current in 1870,²⁷ the statute represents a very sensible way to deal with suits against foreign corporations. South Carolina is interested in providing a forum for resident plaintiffs against corporations having "minimum contacts" with South Carolina even in out-of-state claims. This interest is just as obviously lacking in the case of out-of-state plaintiffs, whose home state is the one that should be concerned about their being able to sue foreign corporations. South Carolina is also interested in providing a forum for non-resident plaintiffs in "South Carolina claims," in which South Carolina law may be applied. When viewed from this perspective, the distinction be-

26.1 S.C. CODE ANN. § 10-214 (1962).

27. Presumably the phrase, "cause of action shall be situated within this State," means a case where South Carolina law applies. Since South Carolina follows the "traditional rules approach," the terminology will present no problem. Compare the South Carolina statutory phrase with the use of the term, "where the cause of action arose," in construing a borrowing statute of a state that has abandoned the traditional approach as reflected in *Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co.*, 372 F.2d 18 (3rd Cir. 1966), cert. denied, 387 U.S. 930 (1967).

tween residents and non-residents in out-of-state claims is perfectly rational and would not seem to constitute any kind of "invidious discrimination."²⁸

It may be analogized, for example, to a distinction between resident and non-resident plaintiffs when posting security for costs.²⁹ If the statute had been applied here, the suit would have been barred without regard to the extent of the defendants' activities in South Carolina. To bar the suit on this basis would, to say the least, not leave the plaintiffs without a forum, since they could sue in their home states—which is where the harm occurred—or in the states where the defendants were incorporated or had their principal place of business. The only reason the plaintiffs did not sue in any of those states was that the suit would have been barred by limitation; which shows precisely why South Carolina's approach to allowing suits against foreign corporations is ordinarily very sound.

In *Szantay v. Beech Aircraft Corp.*,³⁰ however, the Fourth Circuit held that South Carolina's "door-closing" statute would not be applied by a federal court in a diversity case. In that case the defendant Beech, which had sufficient contacts with South Carolina to satisfy due process requirements, was a Delaware corporation, having its principal place of business of Kansas. The decedent was a resident of Illinois. He purchased an airplane manufactured by Beech, which was delivered to him in Nebraska. He flew it to Miami, Florida, and then to Columbia, South Carolina, where it was serviced by a South Carolina corporation. He left the next morning on his way back to Illinois and the plane crashed in Tennessee, killing all the occupants. Suit was brought in South Carolina against Beech and against the South Carolina

28. In *Central R.R., & Banking Co. v. Georgia Constr. & Inv. Co.*, 32 S.C. 319, 19 S.E. 107 (1889), the court upheld the statute against a privileges and immunities claim, but only on the ground that it distinguished on the basis of residence rather than citizenship. The same reasoning was employed by the Supreme Court in *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929), to uphold a New York statute denying to non-residents the right to sue foreign corporations doing business in New York on out-of-state tort claims. But without regard to the "citizen-resident" justification, the distinction between residents and non-residents is reasonable in terms of the state's interest in providing a forum for its own residents. See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 515-516 (1963).

29. This has long been required in practically every American jurisdiction, and its constitutionality never appears to have been questioned.

30. 349 F.2d 60 (4th Cir. 1965).

corporation. Beech's motion to dismiss in reliance on the South Carolina statute was denied by the District Court, and the denial was affirmed by the Fourth Circuit.

The Court first noted that the "constitutional compulsions of *Erie*" were not present, since the "right" arose under the laws of Tennessee, and that the South Carolina statute, therefore, was not "intimately bound up with the right." It then considered whether the South Carolina statute "embodies important policies that would be frustrated by the application of a different federal jurisdictional rule" and if so, whether the state policy was to be "overridden because of a stronger federal policy." It treated the statute as one of "door-closing," perhaps embodying a policy of forum non conveniens, which would be inapplicable in the view of the Court, since suit was not being brought in a state court. In any event, it found that countervailing federal considerations overrode any state policy. It saw inherent in the statute discrimination against non-residents, which if not necessarily unconstitutional, was nonetheless "inconsistent with the purpose of the granting of diversity jurisdiction to the federal courts." Moreover, the "door-closing" feature of the statute, while it also might not be unconstitutional under the Full Faith and Credit Clause, was "contrary to its implicit policy in that it prevents enforcement of the Tennessee Wrongful Death Action in the South Carolina state courts."³¹ It also noted that the plaintiff's choice of a South Carolina forum was not "frivolous," since South Carolina was the only place the South Carolina defendant could have been sued.³² In *Ratliff-Nichols* the Court noted the latter point³³ and then said it did not have to deal with the "door-closing" defense. Whether *Szantay* was decided correctly from the standpoint of federal jurisdiction is at least open to question.³⁴ The point I would emphasize here is that South Carolina was trying to bar suits in cases in which it had no interest in providing a forum, and that *Ratliff-Nichols* could not have been brought in the South Carolina state courts.

31. *Id.* at 64-66.

32. The court did not consider whether it would be subject to suit under the Tennessee "long arm" act.

33. South Carolina has held that this would make no difference and that notwithstanding the presence of the domestic defendant, the suit against the foreign corporation must be dismissed. *Gibbs v. Young*, 242 S.C. 217, 130 S.E.2d 484 (1963).

34. The fact that the court in *Ratliff-Nichols* indicated that the question was still an open one casts doubt on *Szantay*.

There should be no question but that South Carolina can constitutionally refuse to hear out-of-state claims brought by non-resident plaintiffs against foreign corporations who are otherwise subject to suit in South Carolina. It is not engaging in "invidious discrimination" against non-resident plaintiffs, since it allows them to sue in South Carolina on South Carolina based claims. It has no interest in providing a forum for them in out-of-state claims, while it has such an interest whenever a South Carolina plaintiff is involved.

Nor should the Full Faith and Credit Clause³⁵ be interpreted to require a state to provide a forum for non-resident plaintiffs to bring suit on out-of-state claims against a foreign corporation that happens to have "minimum contacts" with the state. In *Szantay* the Court said the Full Faith and Credit Clause "expresses a national interest looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states," citing *Hughes v. Fetter*.³⁶ However, in *Hughes*, the statute in question was truly one of "door-closing," which barred suits under the wrongful death statutes of other states, although the forum itself had a wrongful death act.³⁷ The Court emphasized the *discrimination* that was effected against wrongful death claims arising under the law of a sister state.³⁸ After *Hughes*, it has been assumed that if the forum does not recognize a particular claim under its own law, it can refuse enforcement of such a claim existing under the law of a sister state if it offends its "public policy."³⁹ The forum may also refuse to enforce a sister state claim that is barred by its own statute of limitations in order to implement the procedural policy reflected in the statute.⁴⁰ And, of course, a particular suit may always be dismissed on forum non conveniens grounds.

35. U.S. CONST. art. IV § 1.

36. 341 U.S. 609 (1951).

37. For a discussion of the purpose of the statute in light of its history, see B. CURRIE, *supra* note 28, at 295-298.

38. This is fortified by the decision the following year in *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952), where the Court invalidated an Illinois statute barring suits under foreign wrongful death acts except where a cause of action existed under the law of the place where the death occurred and the defendant was subject to suit there. Again, the emphasis was on the fact that the door-closing statute discriminated against claims existing under the law of a sister state.

39. See, e.g., *Hartness v. Aldens, Inc.*, 301 F.2d 228 (7th Cir. 1962).

40. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

Surely, the legislature may make the determination that certain classes of cases are so "foreign" that they should not be brought in the courts of that state. When the plaintiff is a non-resident and the substantive claim has no connection whatsoever with the forum, the forum has no interest in hearing the case and no obligation to provide a forum simply because the defendant is a foreign corporation having "minimum contacts" with the forum. In no way does the South Carolina statute discriminate against claims existing under the law of a sister state,⁴¹ and insofar as it contains a "door-closing" provision, it is one that is constitutionally unobjectionable.⁴² In *Ratliff-Nichols* South Carolina was a truly disinterested forum, and it should not have exercised jurisdiction irrespective of the extent of the defendants' activities in South Carolina. Suit clearly would have been barred if the federal court had seen fit to apply the South Carolina "door-closing" statute.

We may now consider the matter of the statute of limitations. Why could suit be brought in South Carolina, although barred by limitation under the laws of all the concerned states? The answer is that South Carolina's statute was relatively long and had not expired; South Carolina did not have a borrowing statute; and the applicability of statutes of limitation has been approached in terms of the "substance-procedure" dichotomy. Statutes of limitation have traditionally been characterized as going to "procedure," so that the law of the forum applies. This produces a sound result when suit is barred by the forum's statute, since statutes of limitation represent a strong procedural policy and the forum *qua* forum is interested in applying that policy to any cases brought in its courts.

The problem with the "procedural" characterization arises in cases such as *Ratliff-Nichols*, when the forum's statute has not yet expired.⁴³ Here, the "procedural" characterization ties in with the peculiarly Anglo-American concept of a "right without a remedy." Since there can be a "right without a remedy," and since

41. A South Carolina plaintiff injured by a foreign corporation in another state could sue on that claim in South Carolina, as could a non-resident plaintiff injured elsewhere by a South Carolina resident or a South Carolina corporation.

42. For the sake of consistency, suit should be barred against non-resident defendants in the same circumstances as it is barred against foreign corporations.

43. The problem is compounded where the running of the forum's statute has been tolled due to the non-residency of defendant during the applicable period.

the statute of limitations is characterized as "procedural" and governed by the law of the forum, it follows that if suit is not barred by the forum's statute, it can be maintained even though it is barred by the statute of the state whose substantive law applies. The exception arises when the other state's statute is interpreted as destroying the "right" as well as the "remedy," which has given rise to some very interesting litigation.⁴⁴ But, assuming that the forum's statute has not expired and that the statute of the state whose substantive law applies is interpreted as affecting only the "remedy," suit can be maintained in the forum although barred in the only concerned state.⁴⁵ In an effort to prevent their courts from being used as a haven for time-barred suits, most states have enacted borrowing statutes that incorporate the limitation period of the state whose substantive law will apply. But, South Carolina is one of the states that does not have a borrowing statute.⁴⁶ Thus, in *Ratliff-Nichols* the plaintiffs could sue in South Carolina even though suit was barred in all of the concerned states.

The problem would be solved for future cases if the South Carolina legislature (and the legislatures of the other states that do not have them) would enact a borrowing statute. But even in the absence of legislative action, the courts can abandon the "right-remedy" distinction and hold that suit is barred at the forum if it is barred under the law of the state whose substantive law applies. There certainly is no functional basis for the "right-remedy" distinction. Indeed, it may represent nothing more than a bad example of whether the proverbial chicken came before the proverbial egg. It is said that statutes of limitation are generally "procedural" for conflicts purposes because they destroy only the "remedy" and not the "right." But the reason usually given for saying the statute destroys only the "remedy" is that suit can be

44. Compare *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955), with *Ramsey v. The Boeing Co.*, 432 F.2d 592 (5th Cir. 1970).

45. By "concerned state" I mean the state whose substantive law the forum has decided to use as a model. Whether the forum's approach to choice of law is based on "rules" or "policy," once it makes that choice it concedes that it has no interest in the outcome of the litigation and should strive to reach the same result as that which would be reached by the courts of the state whose law it is using as a model. See Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.L.L. REV. 813, 820-822 (1962).

46. See note 11 *supra*, for a listing of the other states that do not have borrowing statutes.

maintained in a jurisdiction with a longer limitation period. It has long been settled that since statutes of limitation are obviously outcome determinative, they are "substantive" for *Erie* purposes,⁴⁷ and this should be true in conflicts cases as well. As Professor Lorenzen stated many years ago: "A right which can be enforced no longer by an action at law is shorn of its most valuable attribute. After the enforcement of the right of action is gone under the law governing the rights of the parties, it would seem clear upon principle that the same consequences should attach to the operative facts everywhere."⁴⁸

When I first explored the "substantive-procedure" dichotomy⁴⁹ some years ago and considered statutes of limitations, I concluded:

Use of the right-remedy distinction to permit suit serves no useful purpose. Moreover it encourages forum shopping of the worst sort, since suit is brought at the forum because it is barred in the very state which is considered by the forum to be so involved with the claim that its law must be used as a model to determine liability. Therefore, the forum should not base its decision upon the right-remedy doctrine. The shorter statute of limitations of the locus⁵⁰ should be applied simply because the matter materially affects the outcome of the case. No procedural policy of the forum is violated if the suit is refused. The absence of a borrowing statute should not prevent application of the statute of the locus; for a policy against forum shopping can be set out by the judiciary as well as by the legislature.⁵¹

Ratliff-Nichols is a clear example of how the "right-remedy" distinction encourages "forum shopping of the worst sort," and if that distinction had been abandoned the plaintiffs could not have even thought of suing in South Carolina.

Professor Weintraub has gone further, and contends that it is a violation of due process for a disinterested forum to allow a suit not barred by its own statute of limitations, but barred in the interested state or states. He states:

47. See note 16 *supra*, and the discussion in Sedler, *supra* note 45, at 850.

48. Lorenzen, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 496 (1919).

49. Sedler, *supra* note 45.

50. By "locus" I mean the state whose law the forum has decided to use as a model for the rule of decision in the case.

51. Sedler, *supra* note 46, at 850.

Application of the forum's longer limitation period results in a judgment on the merits different from the judgment that could have been obtained in the jurisdiction with which the controversy is most closely connected. A state ought not to be able to apply its own law to a case on the sole ground that the law applied is 'procedural' if application of forum law advances no relevant forum policy and if application of the relevant foreign rule would not be unduly burdensome on the forum when measured against the likelihood that failure to apply the foreign rule will change the outcome of the litigation.⁵²

To permit suit in South Carolina in the *Ratliff-Nichols* situation would present the constitutional issue most sharply, and in my opinion would demonstrate the obvious unsoundness of the "right-remedy" distinction.

Conclusion

The *Ratliff* and *Nichols* cases never should have arisen. While from a behavioral standpoint, the dismissal of the suits should have been fairly predictable, the grounds on which dismissal was ordered by the Court will not be adequate to deal with other cases in which the corporate defendant has "more contacts" with the forum. The fact that these cases did arise should give us pause. The courts should begin to reconsider the notion of "transient jurisdiction" and to limit suit to a "proper forum." Likewise, states should start to "close the doors" where they have no interest in providing a forum. And at a minimum, whether by legislative action or judicial decision, a suit should not be permitted when it is barred by the statute of limitations of the state whose substantive law applies to determine the rights of the parties. It is time to eliminate the truly disinterested forum in the conflict of laws.

52. R. WEINTRAUB, *supra* note 19, at 398. The "procedural" characterization cannot be relied on to justify an application of the forum's law that is otherwise unconstitutional. See e.g., *John Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).